

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

EARNEST THORPE,

Petitioner

**CASE NO. 2:06-cv-926
JUDGE FROST
MAGISTRATE JUDGE ABEL**

JAMES ERWIN, Warden,

Respondent.

OPINION AND ORDER

On January 29, 2007, the Magistrate Judge issued a *Report and Recommendation* pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts recommending that the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 be dismissed as barred by the one-year statute of limitations under 28 U.S.C. §2244(d). Doc. No. 2. Petitioner has filed objections to the Magistrate Judge's *Report and Recommendation*. Doc. No. 6.

Petitioner objects to the Magistrate Judge's recommendation that his habeas corpus petition be dismissed as time-barred. Petitioner argues that the time period during which he pursued appeals from this Court's February 8, 2005, dismissal of his prior habeas corpus petition should not be counted against him. Petitioner also argues that this petition is timely when considering the tolling effect of state collateral actions. *See Objections.*

Petitioner's arguments are unpersuasive. His prior habeas corpus petition was dismissed without prejudice for want of prosecution because he never completed or returned a form petition under §2254. *See Thorpe v. State of Ohio*, Case No. 2:04-cv-297 (S.D. Ohio 2004). Rather than submitting the proper forms with this Court, petitioner pursued an appeal with the

United States Court of Appeals for the Sixth Circuit, and with the United States Supreme Court. Thus, the record fails to reflect that he exercised diligence. The time period during which his prior federal habeas corpus petition was pending does not toll the running of the statute of limitations. *Duncan v. Walker*, 533 U.S. 167, 172 (2001). Further, as discussed by the Magistrate Judge, even assuming that petitioner's post conviction and state habeas corpus petitions tolled the running of the statute of limitations would not render this action timely.

Pursuant to 28 U.S.C. 636(b)(1), this Court has conducted a *de novo* review of those portions of the *Report and Recommendation* objected to. After a careful review of the entire record, and for the reasons detailed in the Magistrate Judge's *Report and Recommendation*, petitioner's objections are **OVERRULED**. The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED** as untimely under 28 U.S.C. §2244(d)(2).

IT SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
United States District Judge